TO THE

SUPREME COURT OF THE UNITED STATES

No. 76-210

JANE SPIVEY,

PETITIONER

vs.

STATE OF GEORGIA,

RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI

TO THE STATE OF GEORGIA

COOK & PALMOUR
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ATTORNEYS FOR PETITIONER

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JURISDICTIONAL STATEMENT

OPINIONS BELOW:

The opinion of the Georgia Court of Appeals affirming the conviction (No. 51778 dated March 18, 1976), its denial of motion for rehearing, and the denial by the Supreme Court of Georgia (not at this time officially reported) are set forth in the appendix.

JURISDICTION:

This petition for certiorari is from a decision of the Court of Appeals of Georgia in a criminal (felony) case, in which that court denied rehearing; and the Supreme Court of Georgia denied certiorari. Defendant complained of denial of her Sixth Amendment right to confrontation at the trial, in the Court of Appeals of Georgia, and in her application to the Supreme

Court of Georgia for the writ of certiorari (denied June 9, 1976).

Defendant consistently contended throughout the trial and appeals that she had been denied her Sixth Amendment right of confrontation; and that the Georgia court misapplied the Dutton decision.

The jurisdiction of this Court to review the Georgia appellate decisions here is authorized by the provisions of 28 USCA 1257(3), in that the right of confrontation by witnesses in a criminal trial is set up and claimed under the Sixth Amendment to the Constitution of the United States.

QUESTION PRESENTED:

Did the Georgia court err in applying the Dutton case (Dutton v. Evans, 400 U.S. 74, 91 S.Ct. 210) to reject defendant's contention that her Sixth Amendment right to confrontation had been denied?

The opinion of the Court of Appeals of Georgia was based upon several different propositions said to have been enunciated in Dutton:

(a) The lack of confrontation by the witness (Pack) was due to the State's negligence, but this was "harmless error."

(b) The statement of this absent witness (presented to the jury by a police officer) was of only "peripheral significance" and was neither "crucial" nor "devastating" because " ... (t)he State's case was not entirely dependent upon Pack's statement," and supporting factual details made it "highly unlikely" that cross-examination of Pack would have shown his statement unreli-

able. (Emphasis added).

Pack's statement (portions of which were related by the police officer from the transcript of a tape-recorded interview) had "indicia of reliability" because "voluntary," "spontaneous" and "against his (Pack's) penal interest."

(c) Dutton permits these "declarations" of co-conspirator Pack made against defendant "during the pendency of the criminal project," under Georgia Code, Sec. 38-306, "even where the alleged accomplice did not appear as a witness."

(All these quotations are from the opinion of the Georgia Court of Appeals).

STATEMENT OF THE CASE:

Jane Spivey was sentenced in a Georgia court on a jury verdict of burglary of her husband's mobile home located in Murray County, Georgia.

The burglars, and their roles, according to the State's evidence was this: (The "T-" and number refer to page of the transcript furnished the Georgia Court of Appeals):

Defendant Jane Spivey conspired with one Larry Pack to burglarize the home of her estranged husband. Pack engaged two men from Atlanta to burglarize the mobile home, who in carrying out the burglary picked up yet a third one. These men were Loggins, Gearin, and Shelton.

Loggins and Shelton had plead guilty to their part in the burglary; and were awaiting sentence when they testified at defendant's trial,

in which they implicated defendant Jane Spivey: They said that they met her at the home of Janie White (sister of Larry Pack), and that defendant Jane Spivey showed them where the trailer was located. Neither Pack nor Gearin testified, but Pack had given a tape-recorded statement to investigating officer McCumber, which the State had transcribed and parts of which McCumber related to the jury. (This testimony of McCumber is the focal point of defendant's contention of denial of confrontation right).

The State also introduced a statement the officers had taken from defendant herself, the phraseology of which implicated her in "the burglary."

Defendant's version is set in the same scenario, and with the same characters, but with a completely different plot! -

Defendant's husband had taken numerous valuable items from her (separate) home in adjacent Gordon County, which she suspected him of having given to the woman with whom he was living in this mobile home. Larry Pack volunteered to go with her and protect her in the event she went to this mobile home to see her husband about these things he had taken. Earlier in the day of the burglary Janie White called and told her that there were some boys at her (Mrs. White's) home who were looking for Larry Pack to collect a debt Pack owed them. Pack had again told defendant earlier that morning that he would go with her to the "trailer" (her husband's mobile home) to protect her from her husband (T-189); so she went over to Mrs. White's home in the event Pack should arrive (T-189).

While defendant and Janie White were talking about going to her husband's house trailer to

see if she could recover some of her things, the boys who had been looking for Pack volunteered to go along to protect her (T-189).

She and Janie White then drove to a point near the trailer, but when she saw that there was no one there, they drove away (T-190, T-205). She knew nothing of the burglary.

She never read the officer's resume of her statement to him, although she did sign it. Her signature was obtained while she was being detained to furnish bail (T-178-179). She pointed out in detail the errors in the written statement, which were basically the differences in the respective evidentiary versions of the State and that of herself (supra; also T-203-204). She gave an explanation of all of the State's damaging evidence; for instance, she explained her purchase of gasoline for the "boys from Atlanta" as a response to their complaint of lack of money and

that they were still looking for Larry Pack (T-190).

Against the background of these conflicting versions of the State and of defendant, we examine officer McCumber's testimony regarding Pack and his statement to McCumber, to evaluate its importance to defendant's claim of prejudice for lack of confrontation by Pack:

When Pack gave this statement he was under arrest for burglary of the home of defendant Jane Spivey, who had sworn the affidavit for the warrant for his arrest (T-112). Pack was "furious" with defendant because of this (T-116). McCumber tape-recorded and transcribed his interview with Pack including both Pack's confession to the burglary of defendant's home and to defendant's involvement in the burglary of her husband's house-trailer (T-98). Pack's statement was that defendant first asked that he kill

or cripple L. D. Spivey, which Pack declined (T-104); and failing in this, she offered him $100 to "rip off" defendant's husband's house-trailer, and also suggested her husband's TV shop as a fruitful source of burglary (T-103). Pack declined this, then she asked him to get someone to do it; to which he agreed (T-104). Pack contacted "two boys" in Atlanta. He knew the name of one of them as "Russell Garrett" but did not know the other (T-106-108). He told "Garrett" to call his sister, Janie White, in Resaca, so that "Garrett" could get in touch with defendant (T-107). (Janie White was also the sister-in-law of defendant, and they were acquainted). These boys had never done a "job" for Pack, but he knew of other jobs they had done (T-107).

Pack also told McCumber of an armed robbery in Sandy Springs, which information did not coordinate with the police records there (T-

119-120).

Through Murray County authorities, McCumber learned of a person named "Russell Gearin," (Pack's "Garrett") who was later charged as a participant in the burglary (T-108). McCumber also learned (independently of Pack) that Pack had an extensive record of convictions of larceny and counterfeiting totaling sentences of over 50 years (with shorter terms actually served - T-109, 110, 111); and that there were then outstanding Federal warrants for his arrest (T-109). On the Murray County charge (for theft of L. D. Spivey's house trailer) Pack was released upon his own recognizance (T-115).

Pack's burglary of defendant's home was supported by a statement obtained by McCumber from the son of Janie White (Pack's sister - T-116), who had apparently told defendant Jane Spivey that Pack had broken into her house (T-

117).

Officer Crisp of Murray County testified that Pack was released upon his own recognizance because "... without Larry Pack's help there would be no case, and ... I didn't know his past record at that time" (T-174). Pack could not be found to testify at the time of defendant's trial (T-170).

Defendant made timely objection to McCumber's testimony of what Pack had told him, invoking her Sixth Amendment right to confront the witness Pack (T-99, 100).

The trial court's overruling of this objection was enumerated as error to the Georgia Court of Appeals, which directly passed upon this constitutional question (see opinion in Appendix). Defendant's application to the Supreme Court of Georgia (which was denied) asked that court to review this constitutional point of law

decided by the Georgia Court of Appeals.

ARGUMENT:

DEFENDANT WAS DENIED HER SIXTH AMENDMENT RIGHT OF CONFRONTATION. THE GEORGIA COURT ERRED IN APPLYING DUTTON AS A PRECEDENT.

Dutton v. Evans (400 U.S. 74, 91 S.Ct. 210) recognized the continued viability of Pointer v. Texas (380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed. 2d 923); Douglas v. Alabama (380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934); Brookhart v. Janis (381 U.S. 1, 86 S.Ct. 1245, 16 L.Ed.2d 314); Barber v. Page, (390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255); Roberts v. Russell, (392 U.S. 293, 88 S.Ct. 1921, 20 L.Ed.2d 1100); and California v. Green (399 U.S. 149, 90 S.Ct. 1930).

The multiple bases of the Georgia Court's reliance on Dutton necessitates their analysis:

(a) Lack of confrontation due to State's negligence as "harmless error."

We do not find this specifically decided by Dutton. The concurring opinion of the Chief Justice and of Justice Blackmun gave as an "additional reason" for concurrence that the spontaneous utterance of Williams (given by Shaw's testimony) was "harmless error if it was error at all." (This did not involve negligence by the State in failing to have a witness present). The minority concurrence in Dutton held the error harmless, apparently because of the inconsequential nature of the Williams utterance, and because of the great weight of the State's evidence of defendant's guilt.

In the case here the denial of confrontation was complete, i.e., defendant had had no opportunity whatsoever to examine Pack (either on direct or cross-examination) at any time.

Compare Mattox v. United States, 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (prior recorded testimony); and California v. Green, 399 U.S. 149, 90 S.Ct. 1930, at p. 1932 (prior opportunity to cross-examine).

The unqualified opinion of the Georgia court here that Pack's absence was due to the State's negligence makes inapplicable consideration of cases involving the witness' unavailability, such as those discussed in Mancusi v. Stubbs, 408 U.S. 204, 33 L.Ed.2d293, 92 S.Ct. 2308, at pp. 2311, 2312.

In Barber v. Page, 390 U.S. 719, 88 S.Ct. 1318, the statement of the absent witness was submitted through the transcript of his sworn testimony given at a preliminary hearing (88 S.Ct. at p. 1319). At the time of defendant's trial in a state court in Oklahoma, the witness was incarcerated 225 miles away in a Federal penitentiary

in Texas (88 S.Ct., at p. 1320). There, "(T)he sole reason why Woods was not present to testify in person was because the State did not attempt to seek his presence." (88 S.Ct., at p. 1322).

"While there may be some justification for holding that the opportunity for cross-examination of a witness at a preliminary hearing satisfies the demand of the confrontation clause where the witness is shown to be actually unavailable, this is not, as we have pointed out, such a case." (Id., 390 U.S. 725-726; 88 S.Ct. 1322).

This case also cites Motes v. U. S., 178 U.S. 458, 20 S.Ct. 993, 44 L.Ed. 1150 (1900), which indicates that historically there was an exception to the confrontation requirement, where the witness was excusably unavailable and the accused had had an opportunity to examine the witness prior to the trial (20 S.Ct.

at pp. 998, 999).

The Georgia court here reaches its conclusion that the error was "harmless" because of the other factors upon which it based affirmance, such as the "peripheral" significance of Pack's statement, the weight of the evidence, the spontaniety and voluntariness of Pack's statement, and the Georgia statute which permitted statements of co-conspirators (Ga. Code, Sec. 38-306).

Under this logic, whether the error was "harmless" would depend upon the correctness of these other propositions upon which the Georgia court affirmed the conviction, which we discuss below.

Prima facie, under the above cases, defendant's confrontation right has been denied because she had no opportunity to examine the witness; and the absence of the witness was the

fault of the State.

(b) The Georgia court erred in finding fact-wise that Pack's statement was "voluntary" and "spontaneous"; was neither "crucial" nor "devastating"; that it was of only "peripheral" significance.

McCumber's resume of his conversation with Pack, which was that Pack stated that his conversation with defendant had "rocked on" for a couple of weeks (beginning with defendant's original suggestion of murder of defendant's husband and ending with their agreement that Pack would get someone to burglarize the home of her husband), contradicts the conclusion of the Georgia court that Pack's statement came within certain principles of Dutton:

Pack's statement to officer McCumber was not "spontaneous" within the Dutton meaning, because it was induced through extensive examination by McCumber, including questions and

answers, most of which were studied and calculated in nature. Pack at that time was under arrest for the burglary of defendant's home, and was in jail. It did not have Dutton's "indicia of reliability"; and was of more than "peripheral significance," because Pack had a reason for involving defendant in the burglary of her husband's home (Pack's own arrest at defendant's instance for burglary of her own home). Defendant denied that she conspired with Pack to burglarize her husband's home.

In Dutton, "(T)he circumstances under which Williams made the statement were such as to give reason to suppose that Williams did not misrepresent Evans' involvement in the crime." (Dutton v. Evans, 400 U.S., at p. 89; 91 S.Ct., at p. 219).

The stage and the actors of the respective versions of defendant and of the State are

practically the same: The principal difference is in the dialogue between the actors - defendant says that her dialogue with Pack was only that he offered her protection from her husband in the event she went to recover articles her husband had stolen from her. Her dialogue with Loggins and Shelton was that (Pack not having appeared) they would accompany defendant and Janie White to the trailer and render the same service. Defendant says that, upon seeing that her husband was not at the trailer, she and Janie White drove on by. Again, there is only a difference in dialogue; Loggins and Shelton say that she showed them the trailer so that they could burglarize it, and admit that she did not go onto the premises. They do say that she waited for them and thereafter inspected the fruits of the burglary; but defendant denies all this.

McCumber's testimony of Pack's

statement to him was "crucial" and "devastating" to defendant: The burglary plan originated at defendant's suggestion. Only Pack and defendant were present. Defendant at first wanted Pack to murder her husband; but after the matter had "rocked on for a couple of weeks" the two agreed that Pack would get someone to burglarize his house trailer. She also suggested her husband's TV shop as a fruitful source of burglary. Pack contacted "two boys in Atlanta" to do the job. He gave one of them the telephone number of his sister (Janie White) in Resaca, Georgia; and told him to call, that "this woman" (he did not mention defendant's name) wanted to talk to him.

Loggins confirmed Pack's contact with him; and Shelton confirmed Loggins' testimony. Both basically confirmed Pack's version of his conspiracy with defendant to burglarize her husband's house-trailer, and that his TV shop

would also be a fruitful source of burglary. McCumber's testimony of Pack's statement places defendant and Pack at the center - rather than at the periphery - of the offense.

The State court interprets Dutton as approving lack of confrontation where "the State's case was not entirely dependent upon (the absent witness') statement" (emphasis added). Here, the over-riding evidence was held to be the testimony of the two co-defendants, plus "Mrs. Spivey's confession." (This same testimony was held to make McCumber's testimony "of peripheral significance at most," and to remove it from the category of "crucial" or "devastating" - which we have discussed above).

The Dutton majority pointed out that:-

"This case does not involve evidence in any sence 'crucial' or 'devastating' as did all the cases just discussed ... It does not involve

any suggestion of prosecutorial misconduct or even negligence, as did Pointer, Brookhart and Barber ...." (400 U.S., at p. 87; 91 S.Ct. 219, emphasis added; majority opinion by Mr. Justice Stewart).

"I am at a loss to understand how any normal jury, as we must assume this one to have been, could be led to believe, let along be influenced by this astonishing account by Shaw of his conversation with Williams in a normal voice through a closed hospital room door. I note, also, the Fifth Circuit's description of Shaw's testimony as 'somewhat incredible' and as possessing 'basic incredibility.'" (concurring opinion of Justice Blackmun and of the Chief Justice, 400 U.S., at p. 91; 91 S.Ct., at p. 221).

Considered from the standpoint of impact upon the jury, Pack's statement to Mc-

Cumber is clearly in a class different to that of Williams' statement to Shaw in the Dutton case, as clearly shown from the above evaluations by the Federal appellate courts of the nature of Williams' statement to Shaw.

(c) Defendant's Sixth Amendment right to confrontation was denied by application here of Sec. 38-306, Georgia Code.

Dutton had this same code section under consideration and held that "...(I)ts application in the circumstances of this case did not violate the Constitution ..." (400 U.S. 88, 91 S.Ct. 219 - emphasis added), pointing out that the statement there was neither "crucial" nor "devastating"; and that the State's case was supported by 19 other witnesses (Id.). The Dutton majority's opinion that "The Georgia statute can obviously have many applications consistent with the confrontation clause ..." (400 U.S., at p. 88, 91 S.Ct. 219), suggests a

reluctance to accept it in all cases.

Does Dutton mean that the statement of the absent witness must in each case be weighed or measured against the testimony of witnesses present at the trial; or does it mean that the rules of evidence under which such statements are made must remain under scrutiny for fairness, or does it mean a combination of the two?

Mr. Justice Rehnquist, writing for the majority in Mancusi v. Stubbs, 408 U.S. 204, 33 L.Ed.2d 293, 92 S.Ct. 2308 (408 U.S., at pp. 213, 214), said:

> "The focus of the Court's concern has been to insure that there are 'indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before a jury though there is no con-

> frontation of the declarant.' Dutton v. Evans, supra, at p. 89, 91 S.Ct. at 220, and to 'afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement,' California v. Green, supra, 399 U.S. at 161, 90 S.Ct. at 1936 ..."

Dutton also suggests the application or formulation of rules under which non-confronting statements may be submitted under the "indicia of reliability" theory, noting several rules already in existence (400 U.S. at p. 80, 91 S.Ct., at p. 215, Div. 3 of opinion).

Barber v. Page, 390 U.S. 719, 88 S.Ct. 1318, seems to furnish precedent for a rule applicable to the instant case; following the principle enunciated in Motes v. U.S., 178 U.S. 458, 20 S.Ct. 993, 44 L.Ed. 1150 (1900):

In Barber, the State had not made

adequate effort to have the witness present. In disposing of the case, the Court "... remanded for further proceedings consistent with this opinion" (390 U.S., at p. 726, 88 S.Ct. 1322) which obviously meant that when the case went back for trial the State should make adequate effort to have the witness present.

In the instant case the Georgia court did not interpret Sec. 38-306, Ga. Code, as affording independent authority for introduction of a co-conspirator's statement. It said that "(T)he admission of McCumber's hearsay testimony (was) erroneous, since Pack's absence can be attributed directly to the mishandling of the investigating authorities ..." (emphasis added). We therefore have here basically the same State negligence as that in Barber.

We do not find in Barber, nor in any of the cases it cites (Motes v. U. S., supra;

Holman v. Washington (5 Cir. 1966) 364 F. 2d 618; Gov't. Virgin Is. v. Aquino (3d Cir. 1967) 378 F. 2d 540, any suggestion of a basis for decision such as that made here by the Georgia court; which is that the weight of the State's evidence is measured against its own negligence in failing to have the witness present, to determine whether or not the statement of the absent witness is "harmless error."

In Barber, denial of defendant's right of confrontation was held complete upon establishment of the fact that the witness might have been available, without more: "(W)e would reach the same result on the facts of this case had petitioner's counsel actually cross-examined Woods at the preliminary hearing. See Motes v. United States, 178 U.S. 458, 20 S.Ct. 993, 44 L.Ed. 1150 (1900)..." 390 U.S., at pp. 725-726; 88 S.Ct. 1322.

The Georgia court's decision is also inconsistent with the Mancusi interpretation (above) of Dutton; i.e., that the Court's concern is to "... insure ... 'indicia of reliability ...'"; and is inconsistent with California v. Green that it is to "... afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement." (399 U.S., at 161, 90 S.Ct. at p. 1936).

"(W)e have more than once found a violation of confrontation values even though the statements in issue were admitted under a recognized hearsay exception." California v. Green, 399 U.S., at pp. 155-156; 90 S.Ct. 1934 (citing Barber and Pointer).

REASON FOR GRANT OF CERTIORARI:

(1) Dutton left uncertain the role of the WEIGHT OF EVIDENCE in considering claims of denial of confrontation; and the Georgia court has here interpreted Dutton to permit dispensing with confrontation when "(T)he State's case was not entirely dependent upon (the non-confronting) statement." The Georgia court gives WEIGHT OF EVIDENCE a dominant role in deciding the confrontation question.

(2) This Court should reconcile the "harmless error" and "indicia of reliability" tests emanating from separate concurring opinions which resulted in the Dutton majority. These two concepts are not consistent: If evidence has "indicia of reliability" it should not be "erroneous," albeit harmless. The Georgia court here has combined both concepts to reach its affirmance of the conviction: It found that,

although admission of McCumber's testimony was erroneous, it was "harmless based upon the predominant facts and logic by which Dutton was decided."

(3) The Georgia court overlooked crucial and substantial facts, (a) in concluding that the McCumber testimony was neither "crucial" nor "devastating," and that it was "of peripheral significance at most;" and that Pack's statement to McCumber was "spontaneous;" (b) It overlooked the fact that the only (two) "eye-witnesses" had pled guilty to the same offense but had not been sentenced when they testified; (c) It overlooked Pack's admitted animosity toward defendant and Pack's long criminal record, in evaluating "indicia of reliability" of his statement to McCumber.

CONCLUSION:

The foregoing demonstrates the importance to defendant of cross-examination of Pack from the standpoint of developing facts. The differences in the origin and nature of the statement of WILLIAMS (in Dutton) to that of PACK here demonstrate the absence here of the elements held in Dutton necessary to excuse lack of confrontation.

Respectfully,

COOK & PALMOUR

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CERTIFICATE OF SERVICE

I have served the foregoing application for writ of certiorari upon the State of Georgia by mailing a copy of it to the following officers of said State:

Hon. Samuel J. Brantley
District Attorney - Conasauga Circuit
Whitfield County Courthouse
Dalton, GA 30720

Hon. Arthur K. Bolton
Attorney General of Georgia
132 Judicial Building
Atlanta, GA 30334

This August 11, 1976.

A Cecil Palmour
Of Counsel for Petitioner

APPENDIX A

IN THE COURT OF APPEALS OF GEORGIA

JANE SPIVEY, Appellant

vs.

STATE OF GEORGIA, Appellee

(unofficially reported: 138 Ga. App. 298)

WEBB, Judge.

Jane Spivey was indicted for burglary, tried and convicted in the Superior Court of Murray County on June 18, 1975, and was sentenced to serve three years in the penitentiary. Her motion for new trial was overruled, and on appeal she enumerates two alleged errors, (1) that she was deprived of due process and a fair trial guaranteed by the Sixth and Fourteenth Amendments, and (2) the evidence did not establish her guilt beyond a reasonable doubt.

The state's brief was not filed until 36 days after the time for filing had expired. Our rules are equally applicable to district attorneys. "This court cannot demand per-

fect administration but does expect reasonable attention to the processing of cases, and particularly in the case of a criminal action fostered by the state against one of its citizens." *State v. Weeks,* 136 Ga. App. 637, 638 (222 SE2d 117). Here, however, we affirm the conviction and sentence.

Upon the trial the prosecution contended that Jane Spivey contacted an acquaintance, Larry Pack, to arrange the burglary of a mobile home belonging to her former husband L. D. Spivey. Two of the state's witnesses, Gary Loggins and Mike Shelton, were co-defendants who had previously pled guilty to the burglary. Gary Loggins testified that he was approached by Pack who told him "he knowed this woman that wants to rip this trailer off that belonged to her ex-husband, and said that she would pay us $500 to do it; and we could have all the stuff out of his trailer"; that at Pack's direction he and Mike Shelton and Russell Gearin drove to the Dalton area where they attempted to reach Pack by telephone; that they went to the home of Pack's sister, Janie White (Mrs. Spivey's sister-in-law), but Pack was not there; that Mrs. White called Mrs. Spivey who came to the house; and that Mrs. Spivey "told us about the trailer, that she wanted us to break into the trailer and steal the stuff, and she would pay us $500 to do it, and she mentioned something about shooting the man's legs off, and breaking into his TV shop and kidnapping him for two or three days."

Mike Shelton's testimony completely corroborated Loggins'. Both men also testified that Mrs. Spivey and Mrs. White led them to the trailer and waited at the intersection of the highway and the dirt road where the trailer was located until the burglary was completed. Subsequently they returned all the stolen items to the investigating officers.

Gearin and Pack did not testify. However, Edward McCumber of the Gordon County Sheriff's Department testified that he interviewed Pack while conducting an investigation of another burglary in Gordon County. At that time no one had been charged with or arrested for the burglary of the trailer of L. D. Spivey, nor had any of the stolen goods been recovered. The interview was recorded and transcribed and, over objection, was allowed in

evidence because Pack was unavailable to testify.

The state claimed that it made a diligent search for Pack prior to the trial. The evidence showed that Pack had been charged with the Spivey burglary and placed in the custody of the Murray County Sheriff's office, but released on an "own recognizance" bond before it was known that he had a criminal record of 28 arrests and 11 convictions. He was also on bond from Gordon County and a federal bench warrant for his arrest was outstanding. After the unsuccessful search of the county his name was placed on the "NCIC" network computer as wanted in Murray County.

The information volunteered by Pack to McCumber during the interview, as read to the jury by McCumber, was as follows: "At the conclusion of my talk with Larry Pack, my first statement was 'O.K., this is pretty well cleared up, you indicated that you have some information in reference to a burglary that happened out of this County, and you said you wanted to tell me about it because you felt it was an injustice what's going on here right now?' Pack said 'Yes sir, the same woman who has got a warrant for me paid two boys out of Atlanta to come up here and burglarize her ex-husband's trailer, and told them what they couldn't steal to tear up, and me and my wife is a witness on that, and my sister went with this woman out there, took the boys out there, and Jane and my sister Janie sat on a dirt road watching for the County Police, while these two boys burglarized the trailer, and they got a shotgun, a rifle, a pistol, a tape deck, a box full of tapes and two or three new sets of clothing that belonged to her husband. . . And he owns a TV shop in—what did I say the name was?' Then I said 'Chatsworth,' and he said, 'Yes, Chatsworth, he owns a TV shop up there.' Then I talked to him, I said, 'O.K. What you are saying in summary is that Jane Spivey and her husband are separated, is that right, and you mentioned to me before that she asked you to do her a favor, is that correct? 'Yes, sir.' 'What was the favor she wanted you to do? "She asked me if I could get someone to kill her husband,' and I told her I couldn't get nobody killed, but I would get somebody to shoot him, you know, to mess him up pretty bad, and she said she didn't want him messed

up, she wanted him dead, and I said 'Well'. . . . Q. Excuse me again for interrupting, but now who is the 'she' that Larry Pack keeps referring to? A. She is Jane Spivey. Q. O. K. Continue, please. A. And I said, 'Well, I can't get nobody to do that.' And so it rocked on a couple of weeks, and she asked me if—and she, Mrs. Spivey asked me if I could get someone to burglarize, well, she asked me to do it to start with, to go over there and burglarize the trailer and she'd give me $100.00. And I told her I didn't want to, and she said, 'Well, can you get someone to do it?' And so I called these two boys in Atlanta, they came up, they met Jane Spivey at my sister's house, Janie White, in Resaca, Georgia."

Agent W. E. Dodd of the Georgia Department of Investigation testified that Mrs. Spivey signed a waiver of rights form and confessed to her participation in the burglary. Officer McCumber, the Sheriff of Gordon County and a deputy testified that Mrs. Spivey's statement implicating herself was freely and voluntarily given in their presence and that she waived her right to remain silent or to have an attorney present. The statement and two waiver of rights forms signed by Mrs. Spivey were admitted in evidence.

Mrs. Spivey testified in her own behalf and repudiated her previous statement, asserting that Larry Pack had offered to protect her while she entered L. D. Spivey's trailer to retrieve some personal items Spivey had stolen from her, and that the break-in and burglary occurred without her knowledge. She also swore that she had repeatedly requested to have present an attorney who was representing her in other affairs before she was questioned.

The jury found Jane Spivey guilty of the burglary of the mobile home of L. D. Spivey. She contends that by allowing Officer McCumber to read Pack's statement when Pack was not present and did not testify, she was deprived of her right of confrontation and of cross examination of Larry Pack, and was denied a fair trial and due process of law. The essential question before us, then, is whether under the circumstances of this case Jane Spivey's burglary conviction must be set aside because of the admission of McCumber's testimony as to Pack's

statement. We conclude that the question has been answered in the negative by the Supreme Court of the United States in Dutton v. Evans, 400 U. S. 74 (91 SC 210, 27 LE2d 213) (1970).

Code § 38-306 provides that "After the fact of conspiracy shall be proved, the declarations by any one of the conspirators during the pendency of the criminal project shall be admissible against all." In Dutton v. Evans, supra, the Supreme Court considered this provision and concluded that it met the constitutional requirements of the confrontation and due process clauses even where the alleged accomplice did not appear as a witness at the defendant's trial. However, the court laid down no ironclad validations, holding merely that "The Georgia statute can obviously have many applications consistent with the Confrontation Clause, and we conclude that its application *in the circumstances of this case* did not violate the Constitution." Id., pp. 87, 88. (Emphasis supplied.)

Although we view the admission of McCumber's hearsay testimony as erroneous since Pack's absence can be attributed directly to the mishandling by the investigating authorities, based upon the predominant facts and logic by which Dutton was decided, that error was harmless. That there may be harmless constitutional error where it does not adversely affect substantial rights of the defendant is well settled. *Cauley v. State,* 130 Ga. App. 278, 288 (203 SE2d 239) (U. S. cert. den. 419 U. S. 877) and cits.

Here the state's case was not entirely dependent upon Pack's statement. It presented two co-defendant eyewitnesses as well as Mrs. Spivey's confession and this evidence was clearly sufficient to sustain the conviction. Therefore, McCumber's testimony was "of peripheral significance at most" and did not constitute "crucial" or "devastating" evidence. Dutton, supra, pp. 86, 87.

It further appears that Pack divulged the information to the Gordon County Sheriff's office voluntarily while being questioned about an entirely different matter. Thus his statement was spontaneous and against his penal interest. These are "indicia of reliability" which the Supreme Court viewed as

"determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant." Dutton, p. 89. Also, the interlocking factual details in the confessions of Loggins, Shelton, Mrs. Spivey and Pack make it highly unlikely that a cross examination of Pack could have shown the jury that his statement, though made, was unreliable. Id.; See also in this regard, Division 3 of *Gale v. State,* 138 Ga. App. 261.

While disapproving the use by the prosecution of Pack's statement with only the sketchiest showing of his unavailability in court, we agree with the principle first enunciated by Justice Cardozo[1] and quoted in part again in Dutton: "The law, as we have seen, is sedulous in maintaining for a defendant charged with crime whatever forms of procedure are of the essence of an opportunity to defend. Privileges so fundamental as to be inherent in every concept of a fair trial that could be acceptable to the thought of reasonable man will be kept inviolate and inviolable, however crushing may be the pressure of incriminating proof. But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true . . . There is danger that the criminal law will be brought into contempt—that discredit will even touch the great immunities assured by the Fourteenth Amendment—if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law, and set the guilty free." Dutton, pp. 89-90.

Judgment affirmed. Deen, P. J., concurs, Quillian, J., concurs in the judgment only.

ARGUED FEBRUARY 4, 1976 — DECIDED MARCH 18, 1976 — REHEARING DENIED APRIL 1, 1976 — CERT. APPLIED FOR.

Burglary. Murray Superior Court. Before Judge Vining.

Mitchell, Mitchell, Coppedge & Boyett, Neil Wester,

[1]Snyder v. Massachusetts, 291 U. S. 97, 122 (54 SC 330, 78 LE 674, 90 ALR 575).

Cook & Palmour, Bobby Lee Cook, Bobby Lee Cook, Jr., for appellant.

Samuel J. Brantley, District Attorney, for appellee.

APPENDIX B

COURT OF APPEALS
OF THE STATE OF GEORGIA
ATLANTA, April 1, 1976

The Honorable Court of Appeals met pursuant to adjournment. The following order was passed:

51778. Jane Spivey v. The State

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

COURT OF APPEALS
OF THE STATE OF GEORGIA
CLERK'S OFFICE,
ATLANTA APR 1 1976

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Morgan Thomas CLERK

APPENDIX C

SUPREME COURT OF GEORGIA

ATLANTA, June 9, 1976

The Honorable Supreme Court met pursuant to adjournment. The following judgment was rendered:

Jane Spivey v. The State

Upon consideration of the application for certiorari filed to review the judgment of the Court of Appeals in this case, it is ordered that the writ be hereby denied. All the Justices concur.

Bill of Costs, $30
SUPREME COURT OF THE STATE OF GEORGIA
CLERK'S OFFICE, ATLANTA July 2, 1976

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia, and that Cook & Palmour paid the above bill of costs.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Joline B. Williams, Clerk.

TO THE

SUPREME COURT OF THE UNITED STATES

No. 76-210

JANE SPIVEY,

PETITIONER

vs.

STATE OF GEORGIA,

RESPONDENT

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA; AND SUPPLEMENT TO APPENDIX TO PETITION

A. Cecil Palmour
COOK & PALMOUR
P. O. Box 468
Summerville, Georgia 30747

ATTORNEYS FOR PETITIONER

TO THE

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TABLE OF AUTHORITIES

CROWDER v. STATE

(unofficially reported as 237 Ga. 141)
(Case No. 30858-Supreme Court of Georgia)
(See Appendix "E" hereof)

I.

REASON FOR SUPPLEMENTING PETITION AND APPENDIX:

On June 29, 1976, the Supreme Court of Georgia decided the case of Crowder v. The State (No. 30858); but this case was not published until August 26, 1976 (unofficially as 237 Ga. 141); and petitioner's counsel was not aware of this decision until August 27, 1976.

In this case, the Supreme Court of Georgia clearly delineates the meaning of Ga. Code, §38-306, vis a vis the Sixth Amendment confrontation clause, Georgia's confrontation clause, and certain other Georgia statutes invoking statements of co-conspirators; all of which are the subject-matter of the case petitioner has here requested grant of certiorari.

This (Crowder) decision shows that the Court of Appeals of Georgia, in this (SPIVEY) case, made substantial errors which grievously impair petitioner's right of confrontation under both the Federal and State Constitutions.

We herewith point out these errors in our supplementary argument, after giving a resume of the setting in which this (SPIVEY) decision was rendered.

The Court of Appeals of Georgia has issued a stay of its Remittitur, which we attach hereto as Appendix "D". We have also attached hereto as Appendix "E" the opinion of the Supreme Court of Georgia in the Crowder case.

Although the Spivey (Court of Appeals) and the Crowder (Supreme Court) decisions are contrary, we cannot go back to either court because of their rules:

Under the Rules of the Supreme Court of Georgia, "(t)he denial of a writ of certiorari shall not be taken as an adjudication that the decision or judgment of the Court of Appeals is correct ..." (Rule 36(1), as amended Dec. 1, 1975). Under Georgia Supreme Court Rule 36(n), "motion for reconsideration may be made as provided in Rule 32 for motion for rehearing." Rule 32(b) - Time for filing motion for rehearing: "Motions for rehearing must be filed during the term at which the judgment sought to be reviewed was rendered and before the remittitur has been forwarded to the Clerk of the trial court, and, in any event, must be filed within ten days from the rendition of the judgment. No extension of time shall be granted except for providential cause on written application made before the expiration of ten days."

Under the foregoing rules, the Supreme Court of Georgia will not entertain a motion to reconsider its denial of certiorari in this case.

We cannot re-submit the case to the Court of Appeals because such a motion would be too late: Rule 33(b) of the Court of Appeals contains exactly the same provisions as does Rule 32(b) of the Supreme Court of Georgia (above).

We do have the following suggestion as to procedure, which would get the matter back before the Georgia Appellate courts, and also preserve and enhance courtesy between state and federal courts and between the Georgia Court of Appeals and the Supreme Court of Georgia:

Our suggestion is that, since there is an apparent contradiction in the interpretation of Georgia's rule of evidence as to statements of

co-conspirators (also see petitioner's argument, infra), this Court return this case to the Court of Appeals of Georgia for reconsideration, in light of the Crowder case. The Court of Appeals may then do so; or, under Rules 40 and 41 of the Supreme Court of Georgia, certify the question to the Supreme Court of Georgia.

II.

ARGUMENT:

(1) SYNOPSIS AND POSTURE OF PETITIONER'S CASE; AND SUBJECT-MATTER OF THIS SUPPLEMENT TO PETITION FOR CERTIORARI.

The original petition for certiorari included the complaint of violation of Sixth Amendment right of confrontation through misapplication of Georgia Rules of Evidence (Ga. Code, §38-306) as to statements of co-conspirators (p. 24, et. seq., petition for certiorari); and also of misapplication of Dutton (infra) in connection there-

with (p. 18, et.seq., application for certiorari).

The Crowder decision (infra, Appendix "E") which had not been published at the time of SPIVEY's petition to this Court for certiorari, demonstrates clearly and emphatically that defendant SPIVEY's position on the above points are unquestionably correct; although the Supreme Court of Georgia does not express the matter in the same language as did petitioner.

We hereinafter undertake to review the salient points of the Crowder decision which demonstrate the correctness of the views of SPIVEY's original petition for certiorari; in the course thereof comparing the decision of the Court of Appeals of Georgia in SPIVEY with that of the Supreme Court of Georgia in CROWDER.

(2) "NO DECISION HAS BEEN CITED, AND WE HAVE FOUND NONE, IN WHICH THE STATE WAS PERMITTED TO INTRODUCE INTO EVIDENCE AT THE TRIAL OF ONE CONSPIRATOR ITS EX PARTE EXAMINATION OF ANOTHER CONSPIRATOR NOT TESTIFYING AT THE TRIAL IN WHICH THAT CONSPIRATOR CONFESSED HIS AND THE DEFENDANT'S PARTICIPATION IN THE CRIME. THE EXISTING LAW IS TO THE CONTRARY. Hill v. State, 232 Ga. 800(1) (209 SE2d 153)(1974); Lingerfelt v. State, 231 Ga. 354(3) (201 SE2d 445)(1973); Gibbs v. State, 144 Ga. 166(1) (86 SE2d 543)(1915); Smallwood v. State, 132 Ga. App. 186(2) (207 SE2d 671(1974). See also, DOUGLAS v. ALABAMA, 380 U.S. 415 (85 S.Ct. 1074, 13 L.Ed.2d 934)(1965), and BROOKHART v. JANIS, 384 U.S. 1 (86 S.Ct. 1245, 16 L.Ed. 314)(1966)." CROWDER v. STATE, 237 Ga. 141, at pp. 150-151 (see Appendix "E" hereof). (Emphasis added).

The Georgia Supreme Court, in Crowder, rejected the State's contentions that (a) a tape-recorded confession of a co-conspirator which incriminated the defendant on trial was an exception to the hearsay rule under Ga. Code,

§38-306, and (b) the admission of such tape-recorded confession, even though error, was "harmless error" (Id., 237 Ga., at p. 151). These are the same questions as those in SPIVEY, and in DUTTON v. EVANS (infra), upon which SPIVEY relied.

The SPIVEY decision is contrary to the above (CROWDER) decision in that the State, in SPIVEY, was permitted to introduce into evidence at the trial of defendant SPIVEY its ex parte examination of co-conspirator PACK, who did not testify at the trial, and who confessed to his and defendant's participation in the crime. Furthermore, in SPIVEY, such statement (of co-conspirator PACK) was not given under oath, was infected with prejudice and enmity toward defendant; and was related by the officer himself, ostensibly from a typewritten transcript

of his taped conversation with PACK.

(3) "WE HOLD THAT A CONFESSION MADE TO POLICE BY A CO-CONSPIRATOR (IN WHICH OTHER CONSPIRATORS ARE IDENTIFIED AND THEIR PARTICIPATION IS DESCRIBED) IS NOT MADE DURING THE PENDENCY OF THE CRIMINAL PROJECT (i.e., IS NOT MADE DURING THE CONCEALMENT PHASE OF THE CONSPIRACY) BUT IS MADE AFTER THE ENTERPRISE IS ENDED. SUCH CONFESSION THEREFORE IS NOT ADMISSIBLE UNDER CODE §38-306 AND IS INADMISSIBLE AT THE TRIAL OF THE CONSPIRATOR UNDER CODE, §38-414. THIS WAS THE RULE STATED IN MUNSFORD V. STATE, SUPRA, AND WE ADHERE TO IT." CROWDER v. STATE, 237 Ga. 141, at p. 152 (see Appendix "E" hereof). (All above expressions - parenthetical and otherwise - that of the Supreme Court of Georgia). (Emphasis added).

In Spivey, the confession of co-conspirator PACK to police identified all participants, including defendant SPIVEY, and their participation was fully described by PACK. These facts clearly fit the above (CROWDER) rule, that such

statement is NOT admissible under Ga. Code, §38-306, because "not made during the concealment phase." (Crowder, supra).

Crowder explains that "(W)e held in Munsford v. State, 235 Ga. 38, 43 (218 SE2d 792)(1975), that confessions by Williams and Daniels, made to police after their arrests, which incriminated Munsford, were inadmissible against Munsford because those statements were not made in concealment of the conspiracy" (Crowder, 237 Ga., at p. 152 - see App. "E", infra) (emphasis added).

In reaching the above conclusion, the Georgia Supreme Court in Crowder discusses Dutton v. Evans, (1970) 400 U.S. 74 (91 S.Ct. 210, 27 L.Ed.2d 213), as having followed the rule stated in Chatterton (221 Ga. 424(5) (144 SE2d 726) (1965) and in Evans v. State, 222 Ga. 392, 402

(150 SE2d 240)(1966) (which is the same case as Dutton v. Evans, supra). (Crowder, 237 Ga., at p. 152 - see App. "E" infra).

So, the Crowder case does not specifically reject this Court's (Dutton v. Evans) interpretation of §38-306, Ga. Code; but it does limit very narrowly the operation of this Georgia statute when the State seeks to apply it beyond the termination of the criminal enterprise:

(Crowder squarely rejects the proposition of Spivey that the non-confronting statement in Spivey is admissible under §38-306, Ga. Code, as interpreted by this Court in Dutton v. Evans, or in Georgia's Evans and Chatterton cases).

> "The reason for including the concealment phase of the conspiracy under Code Ann., §38-306, and treating the conspirators as a unit cannot be said to apply where one conspirator discloses the identity and participation of another conspirator to police, i.e., where one conspirator directs the attention of the

law enforcement officials toward and points the finger of blame at another conspirator. At that point, the bond between the conspirators is broken and their unity is dissolved." (Crowder, 237 Ga., at p. 152 - also App. "E", same page numbers).

(4) "BECAUSE OF THE CONSTITUTIONAL SUPPORT UNDERPINNING CODE ANN., §38-414, AND THE LINE WHICH MUST BE DRAWN BETWEEN CODE, §38-306, AND THE RIGHT OF CONFRONTATION, WE CONSIDER THE QUESTION OF HARMLESS ERROR IN ACCORDANCE WITH CONSTITUTIONAL STANDARDS (AS THE STATE HAS ARGUED)." CROWDER v. STATE, 237 Ga., at pp. 154-155 (see Appendix "E", infra). (Emphasis added).

The Court then decided that the error was NOT harmless, because (a) certain incriminating facts came only from the non-confronting statement (Id., at p. 155); and (b) the non-confronting statement given as testimony to convict of murder was prejudicial because it also contained the defendant's suggestion that the co-conspirator rape the victim (defendant's

wife) (Id., at p. 155).

The factual patterns in Crowder and Spivey are similar:

In Spivey also, only the non-confronting statement gave the conspiratorial plans, which only Pack and defendant devised, and " ... (W)ithout Larry Pack's help, there would be no case ..." (Officer Crisp, T-174).

Also in Spivey (as in Crowder) the non-confronting statement contained matter highly prejudicial: Officer McCumber testified that Pack told him that defendant actually and in reality wanted him to murder her husband, and insisted that he do so; and that when he declined to do this, she asked that Pack kidnap or seriously cripple her husband (T-104).

Crowder further held that the fact that much of the non-confronting statement was cumulative

of the testimony of other witnesses (toward proof of the same elements of the crime) would not render the error harmless: " ... (T)here is a reasonable possibility that the improperly admitted evidence contributed to the conviction. Schneble v. Florida (405 U.S. 427; 92 S.Ct. 1056); see, State v. Hightower, 236 Ga. 58 (22 SE2d 333) (1976)." Crowder, 237 Ga., at p. 155.

III.

SUMMARY:

Any one of the reasons given separately in divisions (2), (3) and (4) of the above argument demonstrates the error of the Spivey decision. We respectfully suggest that this court remand to the Court of Appeals of Georgia so that it may reconsider, in view of Crowder. When the Supreme Court of Georgia decided Crowder,

it was not aware of (or overlooked) Spivey; because it said that it had found no decision "in which the State was permitted to introduce into evidence at the trial of one conspirator its ex parte examination of another conspirator not testifying at the trial in which that conspirator confessed his and the defendant's participation in the crime." (237 Ga., at p. 150 - also see Appendix "E"). Spivey is clearly such a case.

This question has constitutional dimensions, the Georgia Supreme Court having said in Crowder that "... (W)e consider the question of harmless error in accordance with constitutional standards ..." (Id., 237 Ga., at pp. 154-155); and the Court of Appeals in Spivey having decided the constitutional question on "harmless error" grounds (Appendix A - Spivey v. State, 138 Ga. at pp. 302-303).

COOK & PALMOUR,

Attorneys for Petitioner

By: A. Cecil Palmour
A. Cecil Palmour

P. O. Box 468
Summerville, Georgia 30747

CERTIFICATE OF SERVICE

I have served the foregoing supplement to application for writ of certiorari upon the State of Georgia by mailing a copy of it to the following officers of said State:

Hon. Samuel J. Brantley
District Attorney - Conasauga Circuit
Whitfield County Courthouse
Dalton, Georgia 30720

Hon. Arthur K. Bolton
Attorney General of Georgia
132 Judicial Building
Atlanta, Georgia 30334

This 9 day of September, 1976.

A. Cecil Palmour
Of Counsel for Petitioner

APPENDIX D

COURT OF APPEALS
OF THE STATE OF GEORGIA

ATLANTA, August 9, 1976

The Honorable Court of Appeals met pursuant to adjournment. The following order was passed:

51778. Jane Spivey v. State

It is ordered that the remittitur in this case be stayed pending an application to the Supreme Court of the United States for the writ of certiorari.

COURT OF APPEALS
OF THE STATE OF GEORGIA
CLERK'S OFFICE, ATLANTA,
AUGUST 9, 1976

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ MORGAN THOMAS, Clerk

APPENDIX E

Georgia Law Reporter, Vol. 29, No. 35
August 26, 1976
Supreme Court of Georgia

30858. CROWDER v. THE STATE.

HILL, Justice.

Defendant Claude Thomas Crowder, Claude Berry, and Ava Johnson were indicted on November 12, 1974, for the murder of Ruth Park Crowder, the defendant's wife. Mrs. Crowder was found on May 28, 1974, in bed, murdered with an ax. At the trial co-indictee Ava Johnson testified as a witness for the state. Shortly after being indicted and prior to defendant's trial, co-indictee Berry died as a result of an apparently self-inflicted gunshot wound. Statements made by the deceased Berry and his confession taped by police at Grady Hospital 9 days prior to Berry's death were admitted into evidence against the defendant, who was found guilty of murder and sentenced to life imprisonment.

On Tuesday, May 28, 1974, at about 5:30 p.m. police officers received a call from defendant Crowder, stating that he thought his wife had been killed. Police on patrol were informed by radio and proceeded to the defendant's residence. In an upstairs bedroom police found the deceased wife of the defendant lying in bed covered by sheets with a pillow over her head. A bloody hatchet was lying on the bed, along with a white pair of women's gloves. On the wall was written "death to the rich bitch." Several drawers were partially pulled from the dresser next to the bed, although there was on the dresser a jewelry cabinet containing money which was undisturbed.

The victim was clothed in a blood-soaked nightgown. She was found to have been killed by a chop-type laceration to the left upper neck. There were two similar chop-type lacerations in the left upper back. There were also small wounds above and behind the left ear which possibly were produced with the blunt end of the hatchet.

A finding was made by the chief forensic pathologist for Atlanta that the victim was killed between 7:30 a.m. and 9:30 a.m. the morning of May 28th.

The downstairs door in the back of the house leading into the workshop and basement had been found standing ajar by the defendant's son and a friend upon returning from school that afternoon. The boys shut and locked the door, but did not discover the body then. The friend testified that the door did not look like it had been forced open.

A police officer testified that he investigated the scene of the murder shortly after the defendant's phone call and that there were no signs of forced entry anywhere in the house. He testified that the bed clothes of the victim did not appear to be disturbed, but were in the position they would be in if she had been asleep when killed. He stated that the circumstances at the scene of the murder did not indicate theft as a motive, because there were no bloodstains underneath the bloody hatchet found on the bed sheets (indicating that it was placed on the bed some time after the murder, after the blood had dried), yet only one dresser drawer was actually ransacked, money and coins were found in several drawers, the jewelry cabinet was undisturbed, other valuables were within plain view in the room, and the rest of the house was not ransacked.

The officer testified that during the course of his investigation the defendant asked the police to see if the church money was in its place in a cabinet in the den and indicated to them a spot at the back of a shelf where this money should be. The money was gone, although nothing else in the cabinet was disturbed. (Mrs. Crowder had been in charge of taking the weekly church offerings to the bank to deposit.) The officer testified that the defendant gave a specific account of his activities during that day.

Ava Johnson, a prostitute jointly indicted with the defendant and Berry, testified for the state as follows: On May 21, 1974, she met the defendant in front of a gas station in Columbus, Georgia. He winked at her and asked her to have some coffee with him. During the conversation over coffee, the defendant asked her if she knew anyone who would kill his wife for him. The coffee shop was next door to the motel where the defendant was

staying. The defendant invited her to his room, which she thought was number 21, for a drink. In the room he again asked her if she knew someone who would kill his wife. She told him she did not. The defendant then gave her a ride to meet her friend, Berry. When Ms. Johnson told Berry of the defendant's proposition, Berry stated that if the man was paying, Berry would do the job. Ms. Johnson testified further that she returned to the defendant's room, where the defendant and Berry discussed the killing in her presence. The defendant told Berry that he wanted his wife killed and offered to pay from five to ten thousand dollars. The defendant drew a blueprint of his house on a piece of cardboard on the back of a tablet and gave it to Berry, indicating how to get in and out of the house. Ms. Johnson identified the defendant in court as the man she saw in Columbus. She also identified a photo of the defendant's truck as the truck of the man she saw. On cross examination, Ms. Johnson denied that she and Berry had framed the defendant. She testified that she never saw the defendant again after that meeting.

The clerk at the motel in Columbus testified that defendant Crowder was registered in room 23 from May 21 to 23 and that he stayed at that motel regularly every 8 weeks. The clerk testified that he works the 3 to 11 p.m. shift and that although someone could possibly have gotten into the defendant's room without the clerk's knowledge, the defendant did not complain to him about someone having been in his room.

Robert Estes, a friend of Berry's in the army at Fort Benning, testified that Berry told Estes that a man had approached him through Ava Johnson to kill his wife in Atlanta and that Berry was going to do it. Berry said that the man wanted his wife killed because she would not give him a divorce, that Berry was to be paid $5,000, and that the back door of the man's house would be left open for him. He described the plan for the killing, including coming out of the woods behind the house, entering through the unlocked rear door, and climbing the stairs to the upper level.

Estes testified further that Berry went AWOL for two or three days shortly after this conversation. Then during the last week in May, Berry returned and told

Estes that he had committed the murder. Berry said that he had used an ax to chop the woman's head off, that she was in bed, and that he left a "calling card" so people would know that he had done it. Berry said that he had gotten in through the open back door and that he had tried to make it look like a robbery by stealing some things and taking money that had been left for him to steal. Berry indicated that he was also going to be paid to kill the man's lover's husband. Berry had a large sum of money with him at that time. Estes told police in Columbus what he knew.

James Russ, a soldier, testified that Berry told him that he was going to kill a man's wife for money, and that it would be done in the morning after the man and his son left, but before the wife was awake.

Anthony Thomas, another soldier, testified that Berry went AWOL in May. He talked about killing a man's wife in Atlanta. In July, Thomas said Berry showed him a stack of money which looked like two or three thousand dollars.

A telegraph operator in Charlotte, North Carolina, testified that a man named Ralph Berry sent $200 to Claude Berry from Charlotte to Fresno, California, on August 9, 1974. The victim's sister testified that defendant Crowder was in Charlotte at a funeral on August 9, 1974.

Berry's wife testified that Berry told her he had killed a white man's wife and was to get $5,000 from him.

Eric Smith testified that on August 16, 1974, he was arrested in Atlanta with Berry for firing a revolver in the air. Berry needed money for bail and told Smith that a man owed him money for Berry's having acted as a "hit man." Berry said he killed a woman. Berry told Smith to meet the man in a described car at a specific location for the money. Berry then made a phone call. Smith met the car, and the driver gave Smith $300. Smith sat in the car opposite the driver. Smith identified the defendant as the man in the car. Smith testified that Berry used the name Berry Allen.

Robinson Wynder testified that he was arrested in Atlanta on August 16 with Eric Smith and a man known as Berry Allen. He identified a photo of Claude Berry as

the man he had known as Berry Allen. He testified that he was with Eric Smith when money was picked up from a man and he identified the defendant as that man.

Shirley Walton, a woman whom Berry knew, testified that he asked her to keep a look-out while he killed a woman. She testified that Berry said he was going to kill the woman with an ax. Berry had a drawing of the house layout on a piece of cardboard tablet backing. She said the house belonged to "some Claude." She also testified that she went with Berry to the bus station in Atlanta to meet this man in May, but that she only saw the man from the rear as he followed Berry into the bathroom. Berry came out with $200.

Larry Averette, a prison cellmate of the defendant's, testified as follows as to a statement made by the defendant during a card game: " . . . the case was kind of blown out, because the man that he was supposed to have hired got killed, and that the only thing he was really worried about was — the only thing that could hang him would be what the man said in his statement; and he went into about what they could use in the statement, about what the man said." Averette testified that Crowder had mentioned a woman possibly having seen him pass money to the man, but said it was his word against the woman's.

Sgt. Douglas K. Andrews of the DeKalb County Police Department gave the following testimony: He arrested Claude Berry on November 4, 1974, at the Fort MacPherson army hospital and transferred him to Grady Hospital. After arriving at Grady, Berry was read the warrant charging him with the murder of Ruth Crowder and was advised of his rights. Berry stated that he understood his rights and wanted to talk with the police. (At this point the jury was excluded from the courtroom.) The first comment that Berry made relating to the case was: "If I tell you what I know, Crowder will kill me." He then said: "I can tell you what you need to know about Crowder, but I can't — but I'm not involved." After being assured of police protection Berry then went on to tell Sgt. Andrews about being introduced to the defendant, Claude Crowder, by someone named Ava in a motel room in Columbus, Georgia. Berry stated that he and Crowder discussed price, how the murder would be done, the

leaving of the basement door open, and that Crowder "wanted her possibly drowned in the bathtub, or . . . make it look like a crazy man did it, rape her or something like that." Berry said that about a week later he came to Atlanta and read in the paper about Mrs. Crowder being killed. He called Crowder and asked for some money, stating that he figured Crowder would think he had done it since Crowder had probably asked so many people that he would not know who had killed her. Berry then told of meeting the defendant in the bus station in Atlanta where the defendant gave Berry some money. Berry also stated that the defendant sent money from North Carolina to Berry in Fresno, California, and that the defendant used the name Ralph Berry when he sent the money. Berry was shown five photographs and identified a photograph of the defendant as the man he knew as Claude Crowder. (The foregoing will be referred to hereinafter as Berry's first statement.)

Sgt. Andrews then told Berry that he didn't believe he was telling the whole truth and asked if he wanted to tell it. Berry then admitted that he killed Mrs. Crowder and gave permission to have his statement taped. (This admission and the taped statement will be referred to hereinafter as Berry's confession.)

At the time the taped confession was begun, neither the defendant Crowder nor Ava Johnson had been arrested and the full extent of their participation was not known to the police. The defendant was arrested several hours after the confession and Ava Johnson was arrested several days later.

Berry had been shot in the left side of his lower abdomen with a handgun. The wound apparently was self-inflicted. His statements to the police were interrupted by hospital staff as they administered treatment. Berry had a tube coming out of his nose, a tube coming out of his side and a bag attached to his stomach. He was classified as being in "intensive care." He was in pain and asked for a shot to kill the pain, which was administered shortly before the confession. He died nine days later from the gunshot wound.

Before the confession was taped, Berry was again warned of his rights. The taped confession, consisting of

questions by Sgt. Andrews and answers by Berry, was basically as follows: In May, Berry met a prostitute named Ava Johnson in Columbus, Georgia. He left her in front of a hotel and went to do some business. She was picked up by Claude Crowder. When Berry returned for her, she was gone. He was at a light when a yellowish El Camino truck pulled up. The occupants were Ava Johnson and a man that was a stranger to Berry. Ms. Johnson got into the car with Berry and asked him if he wanted to make some money, saying that the man in the truck had a job. Berry went to the motel with Ava to talk to the man, Mr. Claude T. Crowder. After Crowder fixed drinks, he said that he wanted his wife dead because he had found someone he wanted to marry and divorce would take too long. He drew plans of his house and how to get there and offered $5,000 to Berry. Berry left. The next day he again met with Crowder at the motel and listened to details such as no dogs, no neighbors, the door being left open, what time, which day, and how he would be paid. Berry agreed to do the job. A Tuesday after a holiday Monday (Memorial Day) was decided on. The son would be at school, Crowder would leave for work, and the church money would still be in the house so that the motive would look like robbery. Berry was told where this money was. On Tuesday, May 28, 1974, he drove past the house, parked at a church, and entered the back basement door. He was early so he sat in the basement waiting for Crowder and his son to leave. He saw Crowder come downstairs to make sure the door was open. When he heard Crowder and his son leave, he went up the back steps into the upper part of the house, saw Mrs. Crowder sleeping, and sat down to collect his nerves. He returned to the basement and took an ax off the workbench, returned upstairs and entered the bedroom. He stood looking at the victim for moment, then hit her, first with the blunt end to knock her out, then with the sharp end. Berry stated that she was on the left side of the bed and that he hit her from the right. He covered her head with a pillow and returned to the front of the house. He opened one of two wall closets in the den and took the church money, which was in a blue zipper bag. He took the ax back to the basement, along with a pair of woman's gloves. He then returned to the bedroom, wrote "death to

the rich bitch" on the right-hand wall with an ink pen, opened the clothes closet, and then left. He called Crowder the next night. At first Crowder said it was impossible to have a meeting, but Berry insisted. They met in the bus station bathroom, where Crowder told Berry that police were everywhere. He told Berry to open a post office box and he would mail him money. Berry was asked if he had been paid all the money but at this point Berry said he was tired and asked if he could finish the next day. The tape was never finished.

Objections were made to admission of the tape on the grounds that the conspiracy had been concluded and the confession was not admissible under the statements of the co-conspirator exception to the hearsay rule. Objection was also raised as to the voluntariness of the confession due to the fact that Berry had been given a drug to kill pain shortly before it was taped. These objections were overruled and the jury returned. Officer Andrews repeated his testimony concerning Berry's arrest and questioning. The taped confession was tendered into evidence and was objected to on the additional ground that proper voice identification had not been made. This objection was overruled and the tape was played to the jury.

At the conclusion of the tape, Andrews was asked whether the following information had been made public at the time of the murder: the contents of the writing on the wall, type of weapon used, color of the bank bag, number of cabinets in the den, method of entry, and whether or not the victim's head was covered with a pillow. Andrews replied that only the method of entry had been made public.

Andrews testified that the defendant was not taken to the hospital for personal identification because Berry had identified him from a photograph. At this point, the state rested its case.

The defendant's son testified that there was nothing different about his father's normal breakfast ritual on the day his mother was murdered. He said he never viewed any discord between his parents.

Various neighbors and friends testified as to the defendant's good reputation in the community. One

neighbor testified that Crowder stayed in her home after the murder and that someone was with him constantly except when he was asleep. This neighbor's husband testified that the defendant slept at their house after the murder, that someone was with him at all times except when he was sleeping, and that he did not believe it was possible that the defendant had gotten out of the house at night without his knowledge.

Defendant Crowder testified in his own behalf. He stated that the day of the murder, he got up, had breakfast with his son, carried the garbage out, and left for work at 7:25. He went first to an automobile dealer's in Fairburn and had coffee. He made other calls that day and finished in Carrollton at 4:25. He left there and returned home, arriving at approximately 5:20. He went into the bedroom and saw his wife's body. He did not disturb the scene other than to lift the pillow and put his hand on her leg. It was cold. He saw the ax on the bed and left the room. His daughter drove up outside and he told her he thought her mother had been killed. He called the police, went outside and waited five minutes, called again, and went back outside to wait. The police came, and he took them to the bedroom. The defendant stated that he showed police a clipboard of his day's activities in response to their questions. He testified that they would not let him move his car and that he was allowed in the house only once before the funeral, accompanied by a policeman. He stated that the police asked him what might be missing. He told them that the church money might be gone. At trial he stated that he couldn't remember any other things of value in the house. The police told him that he was a prime suspect until they found someone else. They asked him to take a polygraph test, which he did.

Crowder stated that he had been in Columbus on May 21 and 23, 1974, that he had been going to Columbus as a regular part of his sales route for 5 years, and that he usually checked in at 5:30 or 6:00 p.m. On this occasion, he relaxed a while, then walked downtown and ate. He walked back to the motel and entered his room. He noticed the smell of smoke, which he considered odd since he doesn't smoke. One of his business cards and a lot of business pens were missing from the top of a dresser

where he had left them. He walked to the night clerk's desk and asked who had been in his room. He then went for a walk. When he returned, a black lady was standing by his room. She asked him if he wanted a date and he said no. A black guy walked up, and the two strangers followed him into his room and asked to use the phone. The defendant testified that he had no conversation with these people, but that one of them picked up a pen and said: "Well now, Mr. Crowder, we ain't going to harm you." Then they left at his request.

He stated that he loved his wife, that they had no disagreements and he had never discussed divorce. He admitted that he had sharpened the ax the night before the murder and left it on the workbench. He later admitted his daughter's rebuttal testimony as to his discussions with her about divorce, but said that he had made those comments only as light conversation.

The defendant enumerates two errors for consideration on appeal, as follows: The trial court committed reversible error by (1) admitting the taped confession of Claude Berry into evidence in that his confession was made after termination of the criminal conspiracy, and (2) admitting into evidence the testimony of police officers recounting statements made to them by Berry prior to the making of the taped confession. We begin with the first enumeration.

The state concedes, as must be done, that the taped interrogation of Berry and his answers constitute a confession. Thus we have the taped examination of Berry by police played before the jury. Conspirator Crowder was not present at that interrogation and hence was neither confronted by Berry nor given the opportunity to cross examine him.

No decision has been cited, and we have found none, in which the state was permitted to introduce into evidence at the trial of one conspirator its ex parte examination of another conspirator not testifying at the trial in which that conspirator confessed his and the defendant's participation in the crime. The existing law is to the contrary. *Hill v. State,* 232 Ga. 800 (1) (209 SE2d 153) (1974); *Lingerfelt v. State,* 231 Ga. 354 (3) (201 SE2d 445) (1973); *Gibbs v. State,* 144 Ga. 166 (1) (86 SE 543)

(1915); *Smallwood v. State,* 132 Ga. App. 186 (2) (207 SE2d 671) (1974). See also Douglas v. Alabama, 380 U. S. 415 (85 SC 1074, 13 LE2d 934) (1965), and Brookhart v. Janis, 384 U. S. 1 (86 SC 1245, 16 LE2d 314) (1966).

The state argues (1) that no proper objection was made when the tape was played to the jury; (2) that the tape was admissible under the conspirator's exception to the hearsay rule, Code Ann. § 38-306; (3) that the tape was admissible as an exception to the hearsay rule under Code Ann. § 38-309; (4) that the tape was admissible as a manifest necessity exception to the hearsay rule; and (5) that if the tape was inadmissible, the error was harmless.

Objection to the tape on the ground that it was not admissible in that it was made after the conspiracy had ended and thus did not come within the conspirator's exception, was made at the conclusion of the Jackson-Denno hearing. It was overruled and thus it was not waived by failure to remake it when the jury returned and the tape was replayed.

The Georgia law dealing with the admission into evidence against a criminal defendant of statements made by a conspirator is contained in two sections of our Code. Code Ann. § 38-306 provides: "After the fact of conspiracy shall be proved, the declarations by any one of the conspirators during the pendency of the criminal project shall be admissible against all." Code Ann. § 38-414 provides: "The confession of one joint offender or conspirator, made after the enterprise is ended, shall be admissible only against himself." The state relies upon the former; the defendant upon the latter. We are called upon to delineate the two.

It is clear that the fact (existence) of conspiracy was proved. Ava Johnson testified directly as to its formation. Others testified as to its continuation. Thus the preliminary requirement of Code Ann. § 38-306 was satisfied. It is equally clear that the Berry tape constituted a confession.

The question thus is whether that confession was inadmissible because made "after the enterprise is ended" (§ 38-414) or admissible because made "during the pendency of the criminal project" (§ 38-306). The two sections are mutually exclusive. As stated in *Hill v. State,*

supra (p. 803): "Both these Code sections clearly contemplate a point in time in certain cases when the conspiracy, including its concealment stage, is at an end so as to render a subsequent confession by an alleged co-conspirator inadmissible in the trial of a defendant who continues to deny his guilt." Thus the sections do not overlap and a conspirator's statement is made either "during" or "after" the conspiracy.

Under our law "the pendency of the criminal project" includes the accomplishment of the crime itself. It may also include acts performed and declarations made after the commission of the crime (see *Burns v. State,* 191 Ga. 60, 73 (11 SE2d 350) (1940) and *Smith v. State,* 47 Ga. App. 797, 803 (171 SE 578) (1933)), one of which is concealment of the identity of the perpetrators. *Chatterton v. State,* 221 Ga. 424 (5) (144 SE2d 726) (1965), cert. den., 384 U. S. 1015; *Evans v. State,* 222 Ga. 392, 402 (150 SE2d 240) (1966), aff., as Dutton v. Evans, 400 U. S. 74 (91 SC 210, 27 LE2d 213) (1970).

As stated in *Evans v. State,* supra, 222 Ga. at 402: "The rule is that so long as the conspiracy to conceal the fact that a crime has been committed or the identity of the perpetrators of the offense continues, the parties to such conspiracy are to be considered so much a unit that the declarations of either are admissible against the other."

On the other hand, we held in *Munsford v. State,* 235 Ga. 38, 43 (218 SE2d 792) (1975), that confessions by Williams and Daniels, made to police after their arrests, which statements incriminated Munsford, were inadmissible against Munsford because those statements were not made in concealment of the conspiracy.

We hold that a confession made to police by a conspirator (in which other conspirators are identified and their participation is described) is not made during the pendency of the criminal project (i.e., is not made during the concealment phase of the conspiracy) but is made after the enterprise is ended. Such confession therefore is not admissible under Code § 38-306 and is inadmissible at the trial of the conspirator under Code § 38-414. This was the rule stated in *Munsford v. State,* supra, and we adhere to it.

The state argues that the purpose of this conspiracy

included the murder of the husband of the defendant's lover and thus the object of the conspiracy had not been completed. The state also argues that at the time the confession was taped, Crowder and Ms. Johnson had not been arrested and that their identity and extent of participation were not known. Nevertheless, when Berry was arrested and began his confession to police the criminal enterprise had ended.

Having recognized a confession made to police by a conspirator (in which other conspirators are identified and their participation in the crime is described) as constituting termination of the criminal project, we turn now to Berry's first statement to police in which he identified Crowder and stated that Crowder tried to procure someone to kill his wife, but sought to conceal that he (Berry) was the perpetrator of that murder.

The reason for including the concealment phase of the conspiracy under Code Ann. § 38-306 and treating the conspirators as a unit cannot be said to apply where one conspirator discloses the identity and participation of another conspirator to police; i.e., where one conspirator directs the attention of law enforcement officials toward and points the finger of blame at another conspirator. At that point, the bond between the conspirators is broken and their unity is dissolved.

Where a conspirator states to police that another person committed a crime but that the declarant had no part in it, declarant is seeking to pin the blame on the other and escape punishment for himself. Such a statement, besides being inherently untrustworthy, cannot be said to be in furtherance of concealment of the identity and participation of the other conspirator in the crime.

We hold that a statement made to police by a conspirator, whether inculpatory or exculpatory as to the declarant, which statement incriminates the other conspirator as a party to the crime, also constitutes termination of the conspiracy. Thus, such statement by a conspirator is not made during the pendency of the criminal project and is not admissible under Code Ann. § 38-306. Anything to the contrary in the per curiam opinion in *Bennett v. State*, 231 Ga. 458 (1) (202 SE2d 99)

(1973), regarding the Lingerfelt statement will no longer be followed.

The result in this case would be no different if we were to reverse the order of defendant's enumerations of error. Moreover, the result would be no different if we were to treat Berry's first statement and his confession together as a unit, as the district attorney urges us to do. Where one conspirator identifies another conspirator to police and describes for them the other's participation in the crime, the concealment phase of the conspiracy has ended.

The state argues that the taped confession was admissible as a declaration against interest under Code Ann. § 38-309. The state urges that a confession is against the penal interests of the defendant. Code Ann. § 38-309 provides that "The declarations and entries by a person, since deceased, against his interest, and not made with a view to pending litigation, shall be admissible in evidence in any case." Without deciding whether the confession of a dying conspirator is a statement against his interest, we find that after commission of a crime, a confession made to police by a conspirator under arrest on a warrant charging him with that crime, which confession identifies and describes the participation of another conspirator, is made with a view toward litigation within the meaning of the Code section and thus Code Ann. § 38-309 does not render such confession admissible.

Although the defendant's enumerations of error raised questions of Code §§ 38-306 and 38-414, we are not unaware that Code § 38-414 has constitutional support in the Sixth Amendment right to confrontation and cross examination, as well as our own Bill of Rights (Code Ann. § 2-105). Just as Code § 38-306 must be kept separate from Code § 38-414, § 38-306 must be kept separate from the Sixth Amendment and Code Ann. § 2-105. We therefore must reject the argument that Berry's confession was made admissible by manifest necessity.

We turn now to the question of harmless error. Because of the constitutional support underpinning Code Ann. § 38-414 and the line which must be drawn between Code § 38-306 and the right of confrontation, we consider the question of harmless error in accordance with

constitutional standards (as the state has argued). To do otherwise would result in one standard when the Code sections are cited and another when the corresponding constitutional provisions are cited.

It is true that parts of Berry's first statement and taped confession were cumulative of other testimony; e.g., the testimony of Ava Johnson as to the meeting at the mote[1] in Columbus, and the testimony of Shirley Walton as to the meeting on May 29 at the bus station in Atlanta, and the testimony as to the telegraphing of $200 from North Carolina to Berry in California. On the other hand, Berry's confession alone fixed the planned date, described the details of this ax murder, and described the location of the church money in a den closet in a blue bag. Moreover, Berry's first statement contained the prejudicial suggestion that the victim be raped. The state's case was largely circumstantial without Berry's confession, whereas with it conviction was almost inescapable. Thus, we cannot find Berry's statement and confession to be harmless beyond a reasonable doubt as required by Chapman v. California, 386 U. S. 18 (87 SC 824, 17 LE2d 705) (1967). Moreover if, as the dissent in Schneble v. Florida, 405 U. S. 427 (92 SC 1056, 31 LE2d 340) (1972), urges, the Chapman test of harmless error has been relaxed, it nevertheless appears that there is a reasonable possibility that the improperly admitted evidence contributed to the conviction. Schneble v. Florida, supra; see *State v. Hightower,* 236 Ga. 58 (222 SE2d 333) (1976).

There is a difference between a conviction based upon circumstances and one based upon the perpetrator's confession which describes an ax murder and incriminates the defendant. That difference gives rise to the reasonable possibility that Berry's statement and confession contributed to the conviction. We therefore cannot accept the argument that the admission of such evidence constituted harmless error.

In view of the foregoing, we find reversible error as to both errors enumerated.

Judgment reversed. All the Justices concur, except Nichols, C. J., Jordan and Hall, JJ., who dissent.

ARGUED MARCH 9, 1976 — DECIDED JUNE 29, 1976.

Murder. DeKalb Superior Court. Before Judge Peeler.

Joseph M. Salome, Robert S. Windholz, for appellant.

Richard Bell, District Attorney, Leonard W. Rhodes, Assistant District Attorney, Arthur K. Bolton, Attorney General, James L. Mackay, for appellee.

HALL, Justice, dissenting.

I dissent to a reversal of this conviction. The majority opinion fails to distinguish between Berry's statement to the police that, "If I tell you what I know, Crowder will kill me," and his later confession. The statement was made at a time when both parties were concealing their participation in the crime. This utterance falls clearly within the scope of Code § 38-306, and is not a "confession" within the meaning of Code § 38-414. It was properly admitted into evidence as an act of a co-conspirator "during the pendency of the criminal project." See *Munsford v. State,* 235 Ga. 38 (218 SE2d 792) (1975); *Hill v. State,* 232 Ga. 800 (209 SE2d 153) (1974); *Evans v. State,* 222 Ga. 392 (150 SE2d 240) (1966); *Burns v. State,* 191 Ga. 60 (11 SE2d 350) (1960).

With respect to the erroneous admission of the confession, "The mere finding of a violation of the Bruton rule in the course of the trial . . . does not automatically require reversal of the ensuing criminal conviction . . . [w]e must determine [the issue] on the basis of 'our own reading of the record and on what seems to us to have been the probable impact . . . on the minds of an average jury.' Harrington v. California. . . In Bruton the court pointed out that 'a defendant is entitled to a fair trial but not a perfect one'. . . Thus, unless there is a reasonable possibility that the improperly admitted evidence contributed to the conviction, reversal is not required." Schneble v. Florida, 405 U. S. 427, 430, 432 (1972). For a later decision holding a Bruton violation harmless, see Brown v. United States, 411 U. S. 223 (1973). Harmless error was also found on an inadmissible confession in Milton v. Wainwright, 407 U. S. 371 (1972).

The evidence of guilt as set forth in the majority opinion is overwhelming in this case.

I would affirm the conviction.

I am authorized to state that Chief Justice Nichols and Justice Jordan concur in this dissent.

IN THE

Supreme Court of The United States

OCTOBER TERM, 1976

No. 76-210

JANE SPIVEY,
Petitioner,
v.
STATE OF GEORGIA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OCTOBER TERM, 1976

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JANE SPIVEY,

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STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

The State of Georgia, by and through the Attorney General of the State of Georgia, respectfully requests this Court to refuse to grant a Writ of Certiorari to the Georgia Court of Appeals on the basis that it is manifest that review of the State Court decision would present no substantial question not previously decided by this Court, and the State Court decision is in accord with the applicable decisions of this Court.

PART ONE

QUESTION PRESENTED

1.

Did the Georgia Court of Appeals apply the correct standard for harmless constitutional error in concluding that the admission of testimony about a statement by one of Petitioner's co-conspirators was harmless error, because the State's evidence also included testimony by two eyewitnesses and a confession made by Petitioner?

PART TWO

STATEMENT OF THE FACTS

Petitioner seeks to have this Court review the decision of the Georgia Court of Appeals in Spivey v. State, 138 Ga. App. 298, 226 S.E. 2d 104 (1976), which upheld her conviction for burglary. The Georgia Court of Appeals held that the admission of testimony about a statement by a co-conspirator of Petitioner's was harmless error because of other, overwhelming evidence of her guilt. The Georgia Supreme Court denied Petitioner's application for certiorari to review the lower appellate court's decision. Petition, appendix C.

Petitioner was convicted of burglary by a jury in Murray County, Georgia in June 1975 and received a sentence of three years imprisonment. At her trial, two persons also charged in the burglary testified as to her planning and their participation in the burglary of the residence of L. D. Spivey, Petitioner's former common-law husband. An agent of the Georgia Bureau of Investigation testified as to a statement made by Petitioner in which she admitted her involvement in the burglary. The State's case also included testimony by a police investigator about a statement by Larry Pack in which he implicated Petitioner in the burglary. Petitioner contends that there was harmful error of constitutional magnitude in the admission of the testimony about the statement by Pack who did not testify at her trial.

Gary Loggins testified at Petitioner's trial that she gave him and two other individuals instructions on the burglary of Mr. Spivey's trailer. (T. 70-72). Loggins testified that Petitioner promised to pay $500 for the burglary, and also asked the group to kidnap Mr. Spivey or to "shoot his legs off," offers which the hired burglars declined. (T. 70). Loggins testified further as to Petitioner's direction of the burglary, including her presence near the scene and her examination of the items taken after the burglary. (T. 76-78, 81-82).

Another eyewitness and participant in the burglary, Mike Shelton, testified about Petitioner's instructions on the burglary of Mr. Spivey's trailer. (T. 126-29). Shelton corroborated Loggins' testimony about Petitioner's expressed desire that her husband be physically harmed. (T. 130). Shelton testified that Petitioner and another woman were waiting for them after the burglary near the trailer. (T. 134-35).

Georgia Bureau of Investigation Agent Willard Dodd testified about two statements given to him by Petitioner on April 24 and April 25, 1975. (T. 150-63). In her first statement to Agent Dodd, Petitioner denied any involvement in the burglary. (T. 153-54). Petitioner was again advised of her rights and questioned about the burglary on the following day. (T. 156-58). In that statement she admitted having originated the plan for the burglary of Mr. Spivey's trailer and having talked to one Larry Pack about the execution of the burglary. (T. 158-59). Petitioner then described how she and her sister-in-law, Janie White, led Pack and the other individuals recruited for the burglary to the trailer. (T. 159-60). Petitioner also stated to Agent Dodd that she had examined certain items taken in the burglary. (T. 160).

Officer Edward McCumber of the Gordon County Sheriff's Department testified at Petitioner's trial about the statement given to him by Larry Pack on April 24, 1975. (T. 96-108). In Pack's statement, he described how Petitioner had approached him to recruit the other persons for the burglary. (T. 103-04, 107-08). Pack added that Petitioner had originally asked him to get someone to kill her former husband. (T. 103-04). At the time of Petitioner's trial, Larry Pack was a fugitive from both State and federal authorities. (T. 97-109). Murray County Deputy Sheriff James Crisp testified as to the efforts to locate Pack prior to Petitioner's trial. (T. 169-171).

The Georgia Court of Appeals upheld Petitioner's conviction and sentence, concluding that any error in the admission of McCumber's testimony about Pack's statement was harmless in view of the other evidence against Petitioner. Spivey v. State, 138 Ga. App. 298, 302, 226 S.E.2d 104 (1976). Citing this Court's decision in Dutton v. Evans, 400 U.S. 74, 86-87, 91 S. Ct. 210, 27 L.Ed.2d 213 (1970), the State court categorized the challenged testimony as "of peripheral significance at most" and not crucial or devastating. Spivey v. State, supra, 138 Ga. App. at 302.

PART THREE

REASONS FOR NOT GRANTING THE WRIT

A. THE STATE COURT'S CONCLUSION THAT THERE WAS NO HARMFUL ERROR IN THE ADMISSION OF THE CHALLENGED TESTIMONY IS IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT AND PRESENTS NO SUBSTANTIAL FEDERAL QUESTION FOR REVIEW.

The Georgia Court of Appeals concluded that the admission of officer McCumber's hearsay testimony about co-conspirator Pack's statement was erroneous because Pack's absence was directly attributable to "mishandling by the investigating authorities," presumably referring to Pack's release by the investigating officers without knowledge of his extensive prior criminal record. The Court concluded, however, that any error was harmless because of the other evidence against Petitioner, including the testimony of two co-defendant eyewitnesses and evidence of Petitioner's confession. In concluding that the error was harmless, the Court of Appeals cited Dutton v. Evans, 400 U.S. 74, 91 S. Ct. 210, 27 L.Ed.2d 213 (1970) and its own decision in Cauley v. State, 130 Ga. App. 278, 203 S.E.2d 239 (1973), cert. den. 419 U.S. 877. Spivey v. State, 138 Ga. App. 298, 302, 226 S.E.2d 104 (1976).

In Dutton v. Evans, supra, this Court found no denial of the right of confrontation in the application of the exception to the Hearsay Rule codified in Ga. Code § 38-306, which provides that "after the fact of conspiracy shall be proved, the declarations by any one of the conspirators during the pendency of the criminal project shall be admissible against all." In concluding that there was no constititutional deprivation under the circumstances presented, the Dutton court pointed out the strength of the State's evidence against the accused. Dutton v. Evans, supra, 400 U.S. at 87-88. The court also noted that the challenged statement was made under circumstances providing "indicia of reliability" because of its spontaneous nature and because it was against the penal interest of the declarant. Dutton v. Evans, supra, 400 U.S. at 89. In Petitioner's case the Georgia Court of Appeals based its decision primarily upon the strength of the other evidence against Petitioner, but also pointed out that the statement by Pack was spontaneous and was against his penal interest. Spivey v. State, supra 138 Ga. App. at 302-03.

While this Court's decision in Dutton v. Evans, did not specifically rely upon the concept of harmless constitutional error, the Georgia Court of Appeals' conclusion that the error in Petitioner's case was harmless is consistent with recent decisions of this Court which have held that "unless there is

a reasonable possibility that the improperly admitted evidence contributed to the conviction, reversal is not required." Schneble v. Florida, 405 U.S. 427, 432, 92 S. Ct. 1056, 31 L.Ed.2d 340, 345 (1972). In Cauley v. State, supra, the case cited by the Court of Appeals in Petitioner's case, the Georgia appellate court relied upon a number of this Court's decisions on harmless constitutional error. Cauley v. State, supra, 130 Ga. App. at 288, 290-93. In view of the overwhelming evidence of Petitioner's guilt, the Georgia Court of Appeals was fully justified in concluding that Petitioner was not substantially harmed by the admission of Officer McCumber's testimony. That conclusion is consistent with this Court's conclusion in the Schneble case that the jury "would not have found the State's case significantly less persuasive had the testimony . . . been excluded." Schneble v. Florida, supra, 405 U.S. at 432. Applying the test set forth in Schneble and in other decisions of this Court, the admission of the testimony challenged by Petitioner was harmless beyond a reasonable doubt.

B. BECAUSE THE GEORGIA COURT OF APPEALS APPLIED THE CORRECT TEST FOR HARMLESS CONSTITUTIONAL ERROR IN PETITIONER'S CASE, IT WOULD BE FUTILE TO REMAND THIS CASE TO THE STATE COURTS FOR RECONSIDERATION IN LIGHT OF THE GEORGIA SUPREME COURT'S RECENT DECISION IN CROWDER V. STATE, 237 Ga. 141 (1976).

In the supplement to her petition to this Court, Petitioner suggests that the case be remanded to the Georgia Court of Appeals for reconsideration in light of recent Georgia Supreme Court decision, Crowder v. State, 237 Ga. 141, __ S.E.2d __, decided June 29, 1976. Supplement to petition, appendix E. In Crowder, the Georgia Supreme Court found reversible error in the admission of a confession by a co-conspirator, deceased at the time of trial, in which he described how the defendant hired him to kill his wife. Citing a number of its previous decisions, the Court concluded that the statement was made after the termination of the conspiracy and that it was therefore inadmissible under Ga. Code § 38-414. Crowder v. State, supra, 237 Ga. at 150-54. The Crowder court rejected the argument of harmless error, concluding that there appeared a reasonable possibility that the improperly admitted evidence contributed to the conviction. The Court pointed out the vast difference between

the strength of the State's case with the inadmissible testimony and without it. "That difference gives rise to the reasonable possibility that (the) statement and confession contributed to the conviction." Id. at 155.

The factual distinction between Petitioner's case and the facts of Crowder v. State, supra, is readily apparent. For example, in Crowder there was no surviving eyewitness to the actual crime, nor was there any confession of guilt by the defendant. Crowder v. State, supra, 237 Ga. at 141-49. Moreover, the test for harmless error articulated by the Georgia Supreme Court in Crowder is identical to that relied upon by the Court of Appeals in Petitioner's case. The standard for determining harmless constitutional error as set forth in Crowder v. State, supra, and in Spivey v. State, supra, is based squarely upon decisions by this Court. Additionally, inasmuch as the Georgia Court of Appeals did find error in the admission of McCumber's testimony at Petitioner's trial, its conclusion on that point is wholly consistent with the Georgia Supreme Court's decision in the Crowder case.

Because the Court of Appeals' decision in Petitioner's case is consistent with the subsequent Georgia Supreme Court decision in Crowder v. State, supra, it would be futile to remand this case back to the Georgia courts for reconsideration.

CONCLUSION

This Court should refuse to grant a Writ of Certiorari to the Court of Appeals of Georgia, as it is manifest that no substantial federal question not previously decided by the Court is presented, and the State court decision is demonstrably in accord with the applicable decisions of this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this day served 3 copies of the foregoing Brief for the Respondent in Opposition upon Mr. A. Cecil Palmour, Attorney for Petitioner, Post Office Box 468, Summerville, Georgia, 30747, by depositing same in the United States mail, properly addressed with sufficient postage prepaid.

This _____ day of _____, 1976.

B. DEAN GRINDLE, JR.